



THE ATTORNEY GENERAL
OF TEXAS

GERALD C. MANN

AUSTIN 11, TEXAS

~~JOHN BEN SHEPHERD~~
XXXXXXXXXXXXXXXXXXXX
ATTORNEY GENERAL

Honorable Cecil H. Tate
County Attorney
Bailey County
Muleshoe, Texas

Opinion No. O-1488

Re: Under Article 567B of the Penal Code, when a complaint is taken by the county attorney against the defendant for obtaining money, etc., with intent to defraud by giving check without sufficient funds, should the complaint be filed as a felony, regardless of whether it is the first offense or not and amount being less than \$50.00?

Dear Sir:

Your request for our opinion on the above stated question has been received by this department.

Section 4 of Article 567B of the Penal Code, setting forth the penalties for violations of Sections 1, 2 and 3 of said article, reads as follows:

"For the first conviction for a violation of sections 1, 2 or 3 of this act, in the event the check, draft or order given on any bank, person, firm or corporation, is Five Dollars (\$5.00) or less, the punishment shall be imprisonment in the county jail not exceeding two years, or by a fine not exceeding Two Hundred Dollars (\$200). For the first conviction for a violation of sections 1, 2 or 3 of this act, in the event the check, draft or order given on any bank, person, firm or corporation, is in excess of Five Dollars (\$5.00), but less than Fifty Dollars (\$50), punishment shall be by imprisonment in the county jail not exceeding two years or by a fine not exceeding Five Hundred Dollars (\$500).

"If it be shown on the trial of a case involving a violation of sections 1, 2 or 3 of this act in which the check, draft or order given on any bank, person, firm or corporation, is less than Fifty Dollars (\$50), that the defendant has been once before convicted of the same offense, he shall, on his second conviction, be punished by confinement in the county jail for not less than thirty (30) days nor not more than two (2) years

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"If it be shown upon the trial of a case involving a violation of sections 1, 2 or 3 of this act that the defendant has two (2) or more times before been convicted of the same offense, regardless of the amount of the check, draft or order involved in the first two (2) convictions, upon the third or any subsequent conviction, the punishment shall be by confinement in the penitentiary for not less than two (2) nor more than ten (10) years.

"For the first conviction for a violation of sections 1, 2 or 3 of this act, in the event the check, draft or order given upon any bank, person, firm or corporation, is in the amount of Fifty Dollars (\$50) or more, punishment shall be by confinement in the penitentiary for not less than two (2) years nor more than ten (10) years."

In view of the above mentioned statute, you are respectfully advised that it is the opinion of this department that when a complaint is filed alleging an offense under said statute when the amount of the check, draft or order is less than Fifty Dollars (\$50) such complaints cannot be filed as felony complaints for the first or second offense.

We do not attempt to pass upon the constitutionality of any portion of said act as the constitutionality of various portions of the act are now being considered by this department.

Trusting that the foregoing fully answers your inquiry, we remain

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ Ardell Williams
Ardell Williams
Assistant

AW:jm:da

APPROVED OCT 14, 1939

/s/ Robert D. Kepne

ACTING ATTORNEY GENERAL OF TEXAS

APPROVED OPINION
COMMITTEE BY BWB
CHAIRMAN